

**FILED**  
Clerk  
District Court

**SEP 20 2007**

For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS

LAW OFFICE OF DOUGLAS F. CUSHNIE,  
a sole proprietorship, and DOUGLAS F.  
CUSHNIE, individually,

Plaintiffs,

vs.

BANK OF HAWAII, et al.,

Defendants.

Case No. CV-07-0020

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

**THIS MATTER** came before the court on September 20, 2007, on defendant Bank of Hawaii's motion to dismiss claims two, three, six, and eight. Douglas F. Cushnie appeared *pro se*; attorney John D. Osborn appeared on behalf of defendant Bank of Hawaii.

**THE COURT**, having fully considered the arguments of the parties,

**GRANTS WITHOUT PREJUDICE** the defendant's motion to dismiss the intentional infliction of emotional distress section of paragraph 17;

**GRANTS WITH PREJUDICE** the defendant's motion to dismiss the negligent infliction of emotional distress section of paragraph 17;

**GRANTS WITHOUT PREJUDICE** the defendant's motion to dismiss claim 3;

**GRANTS WITHOUT PREJUDICE** the defendant's motion to dismiss claim 6; and

**GRANTS WITH and WITHOUT PREJUDICE** the defendant's motion to dismiss claim

8.

All other motions to dismiss are denied, as set out below.

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1 Under Federal Rule of Civil Procedure 12(b)(6), “[a] complaint should not be dismissed . . .  
 2 ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim  
 3 which would entitle him to relief.’” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.  
 4 1990) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). “Dismissal can be based on the lack of  
 5 a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”

## 6 7 **I. CLAIM 2: CLAIM OF CONVERSION**

8 Pursuant to 5 CMC § 3419(1)(c), “[a]n instrument is converted when[] [i]t is paid on a forged  
 9 instrument.” “[T]he measure of liability is presumed to be the face amount of the instrument.” 5 CMC  
 10 § 3419(2).

11 Subject to the provisions of this title concerning restrictive indorsements a  
 12 representative, including a depository or collecting bank, who has in good faith and in  
 13 accordance with the reasonable commercial standards applicable to the business of such  
 14 representative dealt with an instrument or its proceeds on behalf of one who was not the  
 true owner is not liable in conversion or otherwise to the true owner beyond the amount  
 of any proceeds remaining in his hands.

15 5 CMC § 3419(3).

16 The defendant first argues that the plaintiff fails to state a claim for conversion because  
 17 paragraph 16 of the complaint does not set forth any factual allegations to support a claim of conversion  
 18 and makes nothing more than a conclusory legal averment that the defendant converted the plaintiff’s  
 19 funds. The plaintiff in claim 2, however, incorporates the allegations in claim 1 in paragraph 15 of the  
 20 complaint. Because Claim 1 contains several factual allegations to support the plaintiff’s claim of  
 21 conversion, the defendant’s motion to dismiss claim 2 on this basis is **DENIED**.

22 The defendant next argues that because plaintiff may not, as a matter of law, pursue damages  
 23 due to emotional distress under the plaintiff’s claim of conversion, the court should dismiss paragraph  
 24 17 of claim 2, which states “[t]hat as a result of the conversion of said funds defendant negligently or  
 25 intentionally inflicted emotional distress on plaintiff.” While the statute does state that damages under  
 26 the plaintiff’s claim of conversion is presumed to be the face amount of the instrument, it is merely a

1 presumption and not a limitation to the plaintiff's damages. Accordingly, the defendant's motion to  
 2 dismiss paragraph 17 of claim 2 on this basis is **DENIED**.<sup>1</sup>

3 Next, the defendant argues that the plaintiff has not sufficiently made a claim for infliction of  
 4 emotional distress to claim damages for such emotional distress. The plaintiff, however, argues that he  
 5 need not meet the requirements for a claim of infliction of emotional distress because the Uniform  
 6 Commercial Code of the Northern Mariana Islands under 5 CMC § 3419(1)(c) creates liability for  
 7 infliction of emotional distress. This statute, however, creates no liability for infliction of emotional  
 8 distress.

9 Thus, for the plaintiff's claim of intentional infliction of emotional distress to withstand a motion  
 10 to dismiss, the plaintiff must have set forth factual allegations "(1) that the conduct complained of was  
 11 outrageous; (2) that the conduct was intentional or reckless; (3) it must cause emotional distress; and  
 12 (4) the distress must be severe." *Charfauros v. Bd. of Elections*, 1998 MP 16 ¶ 62. Accordingly, because  
 13 the plaintiff has not set forth any of these allegations to support these four elements, the defendant's  
 14 motion to dismiss the plaintiff's claim for intentional infliction of emotional distress in paragraph 17  
 15 is **GRANTED WITHOUT PREJUDICE**.

16 Furthermore, because a claim for negligent infliction of emotion distress caused solely by harm  
 17 to property is not recognized in the Commonwealth of the Northern Mariana Islands, the defendant's  
 18 motion to dismiss the plaintiff's claim for negligent infliction of emotional distress in paragraph 17 is  
 19 **GRANTED WITH PREJUDICE**. *See* Order Partially Granting Defendants' Motion to Dismiss, CV-  
 20 06-0445(R), *Hocog v. OKP (CNMI) Corp.* (N. Mar. I. Commw. Super. Ct. 2006).

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 24 <sup>1</sup> While the plaintiff did not argue that the statute merely created a presumption on damages, the  
 25 plaintiff did argue that his damages for emotional distress are supported by 5 CMC § 4103(1) and  
 26 (5). That statute, however, only applies to the Division 4: Bank Deposits and Collections of the  
 Uniform Commercial Code of the Northern Mariana Islands; it does not apply to the conversion  
 statute.

## 1 II. CLAIM 3: FAILURE TO EXERCISE ORDINARY CARE AND ACTING IN BAD FAITH

2 The defendant argues that the court should dismiss claim 3 because the plaintiff makes no claim  
3 for relief. The defendant is correct. Accordingly, the defendant's motion to dismiss the plaintiff's third  
4 claim on that basis is **GRANTED WITHOUT PREJUDICE**.

## 6 III. CLAIM 6: BREACH OF FEDERAL REGULATIONS

7 The defendant's motion to dismiss the plaintiff's sixth claim for failure to plead a claim for relief  
8 is **GRANTED WITHOUT PREJUDICE**.

## 10 IV. CLAIM 8: BREACH OF CRIMINAL PROVISIONS

11 The defendant also argues that the court should dismiss the plaintiff's eighth claim for lack of  
12 standing to bring a criminal proceeding against the defendant. The plaintiff argues that claim 8 is for  
13 intentional or negligent infliction of emotional distress caused by employees of the defendant  
14 negotiating checks containing forged endorsements in exchange for gratuities and other compensation.

15 The defendant is correct that the plaintiff lacks standing to bring criminal proceedings against  
16 the defendant. Accordingly, to the extent that claim 8 is for violation of a criminal statute, the court  
17 **GRANTS WITH PREJUDICE** the defendant's motion to dismiss the plaintiff's eighth claim.

18 To the extent that the plaintiff's eighth claim is for intentional infliction of emotional distress,  
19 the plaintiff must have set forth factual allegations "(1) that the conduct complained of was outrageous;  
20 (2) that the conduct was intentional or reckless; (3) it must cause emotional distress; and (4) the distress  
21 must be severe." *Charfauros*, 1998 MP at ¶ 62. The plaintiff, however, fails to do so. Accordingly, to  
22 the extent that claim 8 is for intentional infliction of emotional distress, the court **GRANTS WITHOUT**  
23 **PREJUDICE** the defendant's motion to dismiss the plaintiff's eighth claim.

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1 Moreover, to the extent that claim 8 is for negligent infliction of emotional distress, the court  
2 **GRANTS WITH PREJUDICE** the defendant's motion to dismiss the plaintiff's eighth claim. *See*  
3 Order Partially Granting Defendants' Motion to Dismiss, CV-06-0445(R), Hocog v. OKP (CNMI) Corp.

4 **IT IS SO ORDERED.**

5 **DATED** this 20th day of September, 2007.

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9 ALEX R. MUNSON  
U.S. District Court Chief Judge